STATE OF MICHIGAN

IN THE MICHIGAN SUPREME

MARIE DEAN, PERSONAL REPRESENTATIVE OF THE ESTATES OF TALEIGHA MARIE DEAN, DECEASED, AARON JOHN DEAN, DECEASED, CRAIG LOGAN DEAN, DECEASED, AND EUGENE SYLVESTER, ~~DECEASED,~~

Plaintiff-Appellee,

v

JEFFREY CHILDS,

Defendant-Appellant,

and

~~THE~~ CHARTER TOWNSHIP OF ROYAL OAK, ~~DAVID FORD, FRANK MILES, JR., FRANCES THURMAN, JERRY SADDLER and CYNTHIA PHILLIPS,~~

Defendants.

Supreme Court
Case No. _____

Supreme Court
Previous Case No. 122171

Court of Appeals
Case No. 244627 (On Rem)

Court of Appeals
Previous Case No. 240573

Oakland Circuit Court
Case No. 01-029844-NO

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NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL TO THE SUPREME COURT

NOTICE OF HEARING

DEFENDANT JEFFREY CHILDS' APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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STATEMENT OF ORDER APPEALED FROM

Plaintiff seeks to impose liability on governmental defendants for fatal injuries sustained as a result of alleged improper firefighting. On September 11, 2001, and February 12, 2002, the Oakland County Circuit Court signed orders which, in part, denied summary disposition to defendants Jeffrey Childs and the Charter Township of Royal Oak.[1] Pursuant to these orders, the plaintiff's 42 USC §1983 claim was allowed to proceed against the Township, and the plaintiff's state law tort claim was allowed to proceed against Childs. These defendants sought leave to appeal these adverse rulings to the Michigan Court of Appeals (CA #240573), but leave to appeal was denied by Order entered August 2, 2002, for failure to persuade of the need for immediate appellate relief.[2] Defendants thereafter filed an Application for Leave to Appeal to the Michigan Supreme Court. (Sup Ct #122171) On October 30, 2002, the Michigan Supreme Court entered an Order which, pursuant to MCR 7.302(F)(1), and in lieu of granting leave to appeal, remanded this case to the Michigan Court of Appeals for consideration as on leave granted.[3]

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[1] The September 11, 2001 and February 12, 2002 Orders of the Oakland County Circuit Court are attached hereto as Exhibits A and B.

[2] The August 2, 2002 Order denying defendants leave to appeal to the Michigan Court of Appeals is attached hereto as Exhibit C.

[3] The October 30, 2002 Order of the Michigan Supreme Court is attached hereto as Exhibit D.

On May 13, 2004, the Michigan Court of Appeals released for publication its majority and dissenting opinions (CA #244627).[4] All three judges agreed that defendant Township was entitled to summary disposition on plaintiff's §1983 claim. However, the majority concluded that plaintiff's state tort claim could proceed against defendant-appellant, Jeffrey Childs, rejecting his contentions that the claim was barred by governmental immunity and/or the public duty doctrine and/or the absence of any common law duty. The dissenting opinion would have dismissed the state tort claim against defendant Childs premised on his immunity from suit pursuant to MCL 691.1407(2), on the basis that his conduct in fighting fire could not legally constitute "the proximate cause" of the plaintiff's injuries.

Defendant-Appellant, Jeffrey Childs, herein seeks leave to appeal from the May 13, 2004 Opinion of the Michigan Court of Appeals. It is respectfully submitted that the result achieved by the Court of Appeals, which allows this tort litigation to proceed against defendant Childs, is inconsistent with the Michigan Supreme Court opinions in *Robinson v City of Detroit*, 462 Mich 439 (2000), *Beaudrie v Henderson*, 465 Mich 124 (2001), and *Murdock v Higgins*, 454 Mich 46 (1997).

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[4] The May 13, 2004 published majority and dissenting Opinions of the Michigan Court of Appeals are attached hereto as Exhibit E.

STATEMENT OF QUESTIONS PRESENTED

I. WHERE PLAINTIFF'S DECEDENTS DIED IN A HOUSE FIRE, AND WHERE IT WAS ASSUMED THAT PLAINTIFF'S ALLEGATIONS COULD SUPPORT A FINDING OF GROSS NEGLIGENCE, COULD THE EFFORTS TAKEN BY THE FIREFIGHTERS TO PUT OUT THE FIRE BE "THE PROXIMATE CAUSE" OF THEIR DEATHS SO AS TO DENY DEFENDANT CHILDS' GOVERNMENTAL IMMUNITY UNDER MCL 691.1407(2)?

Plaintiff-Appellee says: "Yes".

Defendants-Appellants say: "No".

A majority of the Court of Appeals said: "Yes."

The circuit court said: "Yes".

II. DO FIREFIGHTERS WHO ARE CALLED TO FIGHT FIRES OWE ACTIONABLE DUTIES TO THOSE WHO MAY BE INJURED IN THE FIRE?

Plaintiff-Appellee says: "Yes".

Defendants-Appellants say: "No".

The Court of Appeals ruled that the "public duty doctrine" did not apply to firefighters, but did not rule on the issue raised regarding the absence of any common law duty.

The circuit court said: "Yes:.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Plaintiff's decedents, Taleigha Marie Dean, Aaron John Dean, Craig Logan Dean, and Eugene Sylvester, were children who died in a tragic home fire on April 6, 2000. Defendant-Appellant, Jeffrey Childs, is a Royal Oak Township firefighter who was involved in the efforts to extinguish the fire at plaintiff's home. Defendants David Ford, Frank Miles, Jr., Francis Thurman, Gwendolyn Turner, Jerry Saddler, and Cynthia Phillips, were trustees of the defendant, Charter Township of Royal Oak.[5] This suit was commenced on February 27, 2001, by plaintiff, Marie Dean, as personal representative of the estates of the four children. Plaintiff's original complaint, as well as her amended and second amended complaints, sought to impose liability for the children's deaths on the governmental defendants. [Plaintiff's original and 3rd Amended Complaints are attached hereto as Exhibits F and G.] Count I of those complaints purported to assert a cause of action under 42 USC §1983 for a violation of rights secured by the 14th Amendment to the United States Constitution. Count II sought to impose liability on the individual defendants on the basis of gross negligence which proximately caused the children's deaths. Both causes of action were premised on alleged inadequate and improper efforts to extinguish the fire.

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[5] With the exception of defendant-appellant Childs, and with plaintiff's concurrence, each of the individual defendants was granted summary disposition premised on absolute immunity under MCL 691.1407(5), and they have not been parties to these appellate proceedings. Plaintiff's state law claim against defendant Charter Township of Royal Oak was dismissed by the circuit court on the Township's motion for summary disposition, and plaintiff's federal claim against the Township will be dismissed pursuant to the opinion of the Court of Appeals below. The Township, which was a party to the appeal before the Michigan Court of Appeals, is not a party to this Application as it prevailed below.

On July 3, 2001, defendants filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and (8), contending that plaintiff had failed to state a cause of action under 42 USC §1983; that the individual defendants were, in any event, entitled to the defense of qualified immunity as to any §1983 claim; that each of the governmental defendants was entitled to governmental immunity pursuant to MCL 691.1401, *et seq*, as to any claims brought under state law;[6] and that plaintiff had failed to state a claim under state tort law pursuant to the "public duty doctrine." Plaintiff responded to this motion, asserting that a sufficient claim under 42 USC §1983 was stated through her allegations that the defendants' affirmative acts in fighting the fire had actually caused the smoke and fire to be pushed toward the trapped children, and that there was no qualified immunity for such substantive violations of the children's due process rights. She further argued that her complaint had alleged a viable state claim against defendant Childs which avoided both the public duty doctrine enunciated in *White v Beasley*, 453 Mich 308 (1996), as well as Childs' governmental immunity under MCL 691.1407(2), although plaintiff conceded that the defendant trustees were entitled to absolute immunity pursuant to MCL 691.1407(5).

In support of her factual predicate for these claims, plaintiff attached her own affidavit, as well as the affidavit of fireman John Soave, and sought leave to file a third amended complaint consistent with these factual assertions. In her response to

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[6] It was defendants' contention that the township trustees were entitled to absolute immunity pursuant to MCL 691.1407(5), and that firefighter Childs was entitled to immunity under MCL 691.1407(2) because any conduct alleged against him could not, as a matter of law, have constituted "the proximate cause" of the children's deaths.

defendants' motion, plaintiff set forth the following facts on which she relied in support of the legal viability of her claims:

> On April 6, 2000, The Royal Oak Township Fire Department responded to a call to Plaintiffs residence. When the personnel arrived, it was quickly determined that the fire was located at the front of the residence and that there were children trapped within the back portion of the home. Plaintiff decedents' mother was in the front of the building and talked to the firemen when they first arrived. She told them that her children were in the rear of the building. At this time, she was assured by the firemen that they would extinguish the fire and rescue her children. (Exhibit B - Affidavit of Marie Dean)
>
> Fireman Soave went immediately to the rear of the building in order to attempt to rescue the children. Defendant Childs, knowing that the children were in the rear of the home, directed the firemen present to attack the fire from the front of the building. This caused the flames and smoke to be forced to the rear of the building. This significantly increased the smoke in the rear of the building and accelerated the fire's damage and danger to the rear of the building where the children were located. (Exhibit C - Affidavit of John Soave) This prevented any further rescue attempts. As a result, four children died.
>
> (Plaintiff's Brief in Support, p 3)

Plaintiff thereafter filed a Supplemental Response, citing the circuit court to the (then) just released opinion of the Michigan Supreme Court in *Beaudrie v Henderson*, 465 Mich 124 (2001), which restricted application of the public duty doctrine to police protection.

A hearing was held on defendants' motion for summary disposition on August 29, 2001,[7] and on September 11, 2001, the circuit court released its Opinion and Order

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[7] A copy of the transcript of that hearing is attached hereto as Exhibit H.

Granting [sic] Defendants' Motion for Summary Disposition.[8] As to plaintiff's claim under 42 USC §1983, the court found that plaintiff's evidence supported an assertion that the firefighters had increased the danger to which the children were exposed, and that this was sufficient to support the claimed due process violation against defendant Childs. With regards to the §1983 claims asserted against the Defendant Township, the circuit court gave the plaintiff an opportunity to file a third amended complaint to properly state a failure to train theory.[9] (Opinion, 9/11/01, pp 2-4) As to the plaintiff's state claims, the circuit court concluded that there was sufficient evidence from which a reasonable juror could conclude that the firefighters' actions in fighting the fire constituted "the proximate cause" of the children's deaths, thereby avoiding firefighter Child's governmental immunity under MCL 691.1407(2). (Opinion, 9/11/01, p 4) It further found that the public duty doctrine did not preclude plaintiff's claims against firefighter Childs because, pursuant to the Michigan Supreme Court's opinion in *Beaudrie*, *supra*, that doctrine applied only to police officers. (Opinion, 9/11/01, pp 4-5) The circuit court did agree with the parties that the defendant township trustees were to be dismissed pursuant to their absolute immunity under MCL 691.1407(5). (Opinion, 9/11/01, p 4)

On September 25, 2001, defendants filed a Motion for Rehearing or Reconsideration with the circuit court, suggesting that the court had erred in concluding that substantive due process rights under the United States Constitution had been

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[8] This opinion is dated September 11, 2001, and was apparently entered on September 13, 2001. It is attached hereto as Exhibit A.

[9] A third amended complaint was filed on September 18, 2001.

implicated by plaintiff's factual allegations, and pointing out that the court had not addressed defendants' argument that any such constitutional right had not been clearly established on the date of the fire and that firefighter Childs was, accordingly, entitled to dismissal of the §1983 claim premised on his qualified immunity from suit.

On November 2, 2001, the circuit court issued its Opinion and Order Denying Reconsideration, noting that defendants' qualified immunity argument "would be better brought as a new motion for summary disposition as to claims pled in the amended complaint." (Opinion 11/2/01, p 2)[10] Thus, the motion for reconsideration was denied without prejudice to defendant raising the same issues in the context of a motion for summary disposition. On January 3, 2002, defendants filed such a motion, arguing that, at a minimum, defendant Childs was entitled to an order of summary disposition premised on his qualified immunity under 42 USC §1983. Defendants also provided and cited the court to the then-recently released unpublished Michigan Court of Appeals opinion in *Ortiz v Porter*, CA #226466 (11/30/01),[11] which supported defendants' position that the alleged actions of defendant Childs could not legally constitute "the proximate cause" of the children's deaths.

A hearing on defendants' second motion for summary disposition was held before the circuit court on February 13, 2002.[12] The circuit court thereafter issued its Opinion

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[10] This opinion is dated November 2, 2001, and was apparently entered by the court on November 6, 2001. It is attached hereto as Exhibit I.

[11] A copy of the *Ortiz* opinion is attached hereto as Exhibit J.

[12] A copy of the transcript of this hearing is attached hereto as Exhibit K.

and Order Granting Summary Disposition (with a date of February 12, 2002), holding that defendant Childs was entitled to qualified immunity for plaintiff's §1983 claim because "at the time of the plaintiff's loss, there was no clearly established constitutional right to any particular level of competence in fighting fires" and that "[a] reasonable official could not have concluded that the conduct alleged in the complaint was unlawful."[13] However, the circuit court denied summary disposition to defendant Childs on the state claim, again finding that reasonable minds could disagree as to whether the decision to spray water on the fire from the front of the house constituted "the proximate cause" of the children's deaths.

On February 21, 2002, plaintiff filed a motion for clarification, seeking clarification from the circuit court that it had not intended to dismiss the plaintiff's §1983 claim against the defendant Township. On March 20, 2002, the circuit court issued its Opinion and Order Clarifying Opinion and Order Granting Summary Disposition, in which it agreed that the plaintiff's §1983 claim against the Township had not been dismissed.[14]

Pursuant to the Michigan Supreme Court's Order of October 30, 2002, defendants Township and Childs were thereafter granted leave to appeal (to the Michigan Court of Appeals) the circuit court's orders, discussed *infra*, which (1) held that a viable claim

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[13] This opinion is dated February 12, 2002, and was apparently entered by the court on February 14, 2002. It is attached hereto as Exhibit B.

[14] This opinion is dated March 20, 2002, and was apparently entered by the court on March 21, 2002. It is attached hereto as Exhibit L.

under 42 USC §1983 existed as to the Township; (2) held that it would be reasonable for a jury to conclude that the conduct alleged against Childs constituted "the proximate cause" of the children's deaths, and (3) held that defendant Childs owed a duty to plaintiff's decedents. These issues were briefed to the Court of Appeals, and oral argument was heard. On May 13, 2004, the Court released its opinion, for publication, in which the majority opinion of Judges Cooper and Borrello held that plaintiff's §1983 claim against the defendant Township should have been dismissed, but that defendant Childs' had not been entitled to a dismissal of plaintiff's state law claims. Judge Griffin would have reversed the denial of summary disposition as to both the federal and state claims. The May 13, 2004 Opinion is attached hereto as Exhibit E.

With respect to the state claims against defendant Childs, which are the subject of this Application for Leave to Appeal, the majority held that plaintiff's allegations were sufficient to support a finding that defendant Childs' firefighting constituted gross negligence (an issue not before the court), that this gross negligence could be "the proximate cause" of the plaintiff's decedents' injuries, and that the public duty doctrine did not apply to firefighting. The dissenting opinion noted that the issue of gross negligence had not been presented for review, and would have held that the proximate cause of the plaintiff's decedents' injuries was necessarily the fire itself, or possibly the conduct of an arsonist if it were proven that an arsonist started the fire. The dissent agreed that the public duty doctrine did not apply to defendant Childs. Neither the

majority nor dissenting opinions discussed whether or not any common law duties were owed to plaintiff's decedents.

Defendant Childs herein seeks leave to appeal insofar as the Court of Appeals affirmed the denial of his motion for summary disposition on plaintiff's state claims.

STANDARD OF REVIEW

Defendant-Appellant seeks review of the circuit court's orders which denied his motion for summary disposition brought pursuant to MCR 2.116(C)(7) and (8). To the extent that defendant sought summary disposition pursuant to MCR 2.116(C)(7) based on governmental immunity under MCL 691.1401, *et seq*, the standard of review is *de novo*. *Regan v Washtenaw County Board of County Road Commissioners*, 249 Mich App 153, 157 (2002). To the extent that defendant sought summary disposition premised on the absence of any common law duty, the standard of review is also *de novo*. As explained by the Michigan Court of Appeals in *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 263 (1995):

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Feister v Bosack*, 198 Mich App 19, 21; 497 NW2d 522 (1993). This Court reviews a trial court's decision under MCR 2.116(C)(8) *de novo* and determines "if the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Duran v Detroit News, Inc*, 200 Mich App 622, 628; 504 NW2d 715 (1993). All factual allegations supporting the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Feister, supra* at 21-22, 497 NW2d 522. However, mere conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. *Roberts v Pinkins*, 171 Mich App 648, 651; 430 NW2d 808 (1988). In a negligence action, summary disposition is proper under MCR 2.116(C)(8) if it is determined as a matter of law that the defendant owed no duty to the plaintiff under the alleged facts. *Schneider v Nectarine Ballroom, Inc (On Remand)*, 204 Mich App 1, 4; 514 NW2d 486 (1994).

ARGUMENT

Plaintiff-Appellee, Marie Dean, is the personal representative of the estates of four children who died in a house fire in Royal Oak Township on April 6, 2000. Defendant-Appellant, Jeffrey Childs, is a Royal Oak Township firefighter who was involved in efforts to extinguish the fire at plaintiff's home. In her third amended complaint, plaintiff alleges that Childs took "affirmative actions that significantly increased the risk of danger facing the Plaintiffs and prevented the fire fighters from rescuing the [children]," and that his actions and methods in fighting the fire amounted to gross negligence which was the proximate cause of the children's deaths. (3rd Amended Complaint, Counts I and II, ¶¶ 5, 27-29)

The only issues remaining in this case concern the potential liability of defendant Childs under state law. These issues address the application of statutory governmental immunity to firefighting by firefighters, the availability of the public duty doctrine to insulate firefighters from liability for conduct undertaken by them while fighting fires, and the absence of any common law duties owed by firefighters to those they attempt to protect. Collectively, these issues were foreshadowed by this Court's opinion in *Beaudrie v Henderson*, 465 Mich 124 (2001), which opinion restricted application of the public duty doctrine to police protection by police officers. While excluding other governmental employees from this common law defense, the *Beaudrie* Court observed that the liability protections required by other public servants would be adequately served by the statutory governmental immunity provided by MCL 691.1401, *et seq*, as well as by a traditional

common-law duty analysis.[15] However, as discussed below, the result thus far achieved in this case, which allows the potential for liability to be imposed on defendant Childs for actions taken while fighting a fire, must be reviewed as this result is either erroneous, or calls the *Beaudrie* Court's conclusion of adequate protection for firefighters into question.

This case does not involve liability asserted against a police officer for alleged gross negligence while performing police protection functions, to which the public duty doctrine would indisputably apply. Rather, as noted above, it involves liability asserted against a firefighter for alleged gross negligence while performing fire protection functions. Thus, the Court of Appeals held that *Beaudrie* precluded application of the public duty doctrine to defendant Childs. Yet, the Court of Appeals ignored the dictate of *Beaudrie*, and the request of defendant Childs, to consider whether the circumstances of this case implicated *any* common law duties owed by Childs to plaintiff's decedents. Moreover, the majority opinion also rejected the contention that governmental immunity provided the requisite shield to Childs because his conduct while fighting the fire could not, consistent with *Robinson v City of Detroit*, 462 Mich 439 (2000), constitute "the proximate cause" of the children's deaths when his efforts failed to save them.

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[15] The *Beaudrie* opinion noted that, contrasted to the "public duty doctrine", "a traditional common-law duty analysis provides a far more familiar and workable framework for determining whether a public employee owed a tort-enforceable duty in a given case." (465 Mich, 138)

It is respectfully suggested that "something has to give", and this Court should grant leave to appeal to consider whether the majority's application of the immunity provided to firefighters by MCL 691.1407(2) was too narrow, and/or whether the public duty doctrine should be applicable to firefighters while engaged in firefighting, and/or whether a consideration of common law duty analysis provides the necessary protection based on the absence of any relevant common law duties. But neither the legislative intent embodied in the language of MCL 691.1407(2), nor the common law doctrines discussed in *Beaudrie v Henderson, supra,* support a conclusion which allows litigation to proceed against firefighters which is based on the adequacy of their firefighting.

I. WHERE PLAINTIFF'S DECEDENTS DIED IN A HOUSE FIRE, THE ISSUE OF GROSS NEGLIGENCE WAS NOT BEFORE THE COURT, BUT THE EFFORTS TAKEN BY THE FIREFIGHTERS TO PUT OUT THE FIRE WAS NOT, IN ANY EVENT, "THE PROXIMATE CAUSE" OF THEIR DEATHS AND DEFENDANT CHILDS WAS ENTITLED TO GOVERNMENTAL IMMUNITY UNDER MCL 691.1407(2).

Count II of plaintiff's complaint seeks to impose liability against defendant Jeffrey Childs under state law because of his alleged gross negligence in fighting a fire. It was the position of defendant Childs before the circuit court, as it was on appeal to the Michigan Court of Appeals, that even if it were *assumed* that his conduct constituted gross negligence, that that gross negligence could not legally constitute "the proximate cause" of plaintiff's injuries, as the phrase "the proximate cause" was defined in *Robinson v City of Detroit*, 462 Mich 439 (2000). However, the majority opinion of the

Michigan Court of Appeals held, in a published opinion, that the circuit court correctly denied summary disposition, and that this matter may proceed against defendant Childs:

> Plaintiff presented evidence of Childs' gross negligence through the affidavit of firefighter John Soave. Soave stated that Childs ignored a fire hydrant in the immediate area in favor of one a block away and ordered water shot at the front of the home, forcing fire and smoke into the rear of the home despite the knowledge that a firefighter was attempting to rescue the children from that area. This conduct can fairly be described as "so reckless as to demonstrate a substantial lack of concern for whether an injury results."
>
> Furthermore, plaintiff presented evidence that Childs' conduct was "the proximate cause" of the children's deaths. "The proximate cause" has been defined as "the one most immediate, efficient, and direct cause preceding an injury, not "a proximate cause."" [footnote 28, citing *Robinson v Detroit, supra*] Soave stated in his affidavit that Childs caused the fire "to be pushed" toward the children and prevented the rescue attempt. While it is likely that the arsonist was "a proximate cause" of the children's deaths, plaintiff's evidence, if proven, would show that the children would have survived the fire if Childs' had not acted in a grossly negligence manner. As the factual development of plaintiff's claim may justify recovery, the trial court properly denied Childs's motion for summary disposition on the ground of statutory immunity.
>
> (Slip Opinion, p 6)

The majority's analysis is flawed, and must be reviewed and reversed. As a published opinion, it is likely to have a serious and complicating effect on other cases where issues of immunity under §1407(2) are raised.

First of all, and as noted in the dissenting opinion, the issue of gross negligence was *not* before either the circuit court or the Court of Appeals for decision. Rather, for purposes of his motion, defendant Childs merely *assumed* the existence of gross negligence in order to focus the issue on the requirement of §1407(2) that any such gross

negligence also constitute "the proximate cause" of the injuries.[16] Thus, neither the propriety of the Soave affidavit, nor the proper application of the gross negligence standard to the evidence in this case, was either briefed, analyzed or presented for review, and this issue should not have been the subject of any review.[17]

Further, to the extent that the Court of Appeals opined on the sufficiency of the Soave affidavit to establish gross negligence, as defined in §1407(2), the issue required greater elaboration and discussion than accorded by the majority opinion since this is a significant recurring question in litigation commenced against governmental employees. See, *e.g.*, *Poppen v Tovey*, 256 Mich App 351, 356-357; 664 NW2d 269; *lv den* 668 NW2d 152 (2003); *Ludwig v Dick Martin Sports*, CA #242758 (11/20/03), *rev'd* Sup Ct # 125222 (5/5/04); *Perry v McCahill*, CA #224556 (4/30/02), *rev'd* 467 Mich 945; 656 NW2d 525(2003); *K & S v Walled Lake School District*, CA #244605 (6/8/04); *Ruedger v*

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[16] As Judge Griffin noted in dissent, fn2: "For purposes of his motion for summary disposition, defendant Childs concedes that his conduct may amount to gross negligence. Accordingly, the only issue on appeal regarding the governmental immunity statute is whether plaintiff provided sufficient documentary evidence for a reasonable trier of fact to conclude that defendant Childs' conduct was the proximate cause of the children's deaths. * * *"

[17] The defendants' motions for summary disposition attempted to present issues to the circuit court that could dispose of this litigation on legal grounds. Thus, defendants' assumed the truth of plaintiff's factual allegations (including the allegations contained in their affidavits), assumed that the requisite levels of culpability for both the state and federal claims could be satisfied, and assumed that defendant Childs' position within the fire department did not entitle him to the absolute immunity provided by MCL 691.1407(5). None of these issues has yet been litigated (on motion or otherwise), and it is defendant's position on this appeal that none need be litigated because the legal defenses proffered to the circuit court and Court of Appeals sufficed to compel the dismissal of plaintiff's complaint.

Bruyneel, CA #243832 (2/19/04); *Pagel v Oxford Township*, CA #241217 (11/18/03); *Hutchinson v Township of Portage*, CA #240136 (8/14/03); *lv den* 2004 WL 1294061 (6/11/04); *Poxson v Teachout*, CA #234387 (6/24/03); *Wolford v McGrady*, CA #234405 (2/21/03); *lv den* 670 NW2d 225 (2003); *Gifford v Grimes*, CA #233667 (12/3/02).[18] As evidenced by these opinions, not only is the issue of the meaning and application of the term "gross negligence" a recurring issue, but the legal distinction between ordinary negligence and gross negligence deserved more than the cursory analysis provided in the "to be published" majority opinion.[19]

An analogous flaw is inherent in the majority's application of the *Robinson* definition of "the proximate cause" to the allegations of this case. The majority opinion merely notes that *Robinson* defined "the proximate cause" to be "the one most immediate, efficient, and direct cause preceding an injury." Without further analysis or interpretation of these terms, the majority concluded that plaintiff's allegations could support a finding that the conduct of firefighter Childs, while engaged in fighting a fire, could constitute "the one most immediate, efficient, and direct cause preceding an injury." The issue required more elaboration than provided by the majority in a "to be published" opinion and, as discussed below, its conclusion is erroneous.[20] Consider, on the other hand, the

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[18] The unpublished opinions are attached hereto as Exhibits M, N, O, P, Q, R, S, T and U.

[19] However, this issue was not presented for review and should not have been resolved by the Court of Appeals.

[20] Note also, that the majority's determination that Soave's allegations against defendant Childs could be sufficient to support a finding of "the proximate cause" is

analysis provided by the dissenting opinion which demonstrates a recognition of the nuances of the issue and a deference to case precedent:

> After reviewing the facts in a light most favorable to plaintiff, I conclude "the most immediate, efficient, and direct cause," *Robinson, supra* at 458-459, of the tragic deaths of plaintiff's children was the fire itself, [footnote 5] not defendant's alleged gross negligence in fighting it. Plaintiff's original, amended, and second amended complaints, in effect, concede that the fire was the proximate cause of the deaths:
>
> > "That on April 6, 2000, a fire occurred at the residence of plaintiff and decedents.
> >
> > *That the decedents died as a result of said fire.*" (Emphasis added [in opinion].)
>
> Although the alleged gross negligence of defendant Childs in fighting the fire may have been a "substantial factor," *Brisboy v Fibreboard Corp*, 429 Mich 540, 547-548; 418 NW2d 650 (1988), in the deaths, in my view, its causal connection is insufficient to meet the governmental immunity threshold standard of "the" proximate cause.
>
> In this regard, the present case bears similarities to *Kruger v White Lake Twp*, 250 Mich App 622; 648 NW2d 660 (2002), where our Court held, as a matter of law, that the alleged gross negligence of the township police department was not the proximate cause of the plaintiff's decedent's death. In *Kruger*, the plaintiff called the township police department and requested that her daughter be taken into custody because her daughter was intoxicated and could pose a danger to herself and others. Thereafter, the plaintiff's daughter was transported to the township police department and placed alone in a holding cell. She later escaped, fled from the police, and ran into heavy traffic on Highway M - 59, where she was tragically struck

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stated to be dependent on the potential to show that "the children would have survived the fire if Childs had not acted in a grossly negligent manner." However, this holding is based on an erroneous analysis which would allow a finding that conduct constituted "the proximate cause" of the injuries simply upon a finding that "but for" that conduct, the injuries would not have occurred. This is inconsistent with the reasoning and definitional analysis of *Robinson v City of Detroit, supra*. Moreover, any such finding would necessarily be the result of speculation and conjecture.

and killed by an automobile. In affirming the grant of summary disposition in favor of the defendant police department, we held:

> In the instant case, there were several other more direct causes of Katherine's injuries than defendant officers' conduct, e.g., her escape and flight from the police station, her running onto M - 59 and into traffic, and the unidentified driver hitting plaintiff's decedent. Any gross negligence on defendant officers' part is too remote to be "the" proximate cause of Katherine's injuries. As a result, the officers are immune from liability. *Id.* at 624.

See also, *Poppen v Tovey*, 256 Mich App 351, 357, n2; 664 NW2d 269 (2003) and *Curtis v City of Flint*, 253 Mich App 555; 655 NW2d 791 (2003).

[footnote 5] If it were proven that an arsonist started the fire, the arsonist may be the proximate cause of the deaths.

(Slip Opinion, dissent, p 3)

The dissenting opinion is correct, consistent with *Robinson v City of Detroit, supra*, and consistent with the earlier cited opinions of the Michigan Court of Appeals: *Kruger v White Lake Township*, 250 Mich App 622, 626-627 (2002); *Curtis v City of Flint*, 253 Mich App 555 (2003); and *Poppen v Tovey*, 256 Mich App 351 (2003). For example, in *Curtis, supra*, the plaintiff sought to impose liability on a fire department paramedic unit, complaining that the officers had not followed standard emergency vehicle protocol when they approached an intersection, allegedly causing a collision. However, the Court concluded that the officers' alleged conduct was not the most immediate, efficient, and direct cause of the injuries and could, therefore, not legally constitute "the proximate cause" of those injuries.

The dissenting opinion of the Court of Appeals is also consistent with the language of MCL 691.1407(2), which sets forth the parameters of the immunity statutorily afforded by the State of Michigan to individual governmental employees:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while in the course of employment or service or volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> > (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
> >
> > (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
> >
> > (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

As in most cases involving governmental individuals and their immunity, there was no question that firefighter Childs was acting within the scope of his authority, and that Royal Oak Township was engaged in the exercise or discharge of a governmental function with respect to the operation of the fire department. The critical question was whether Childs' alleged conduct constituted "gross negligence that is the proximate cause of the injury or damage." Although in the past this critical inquiry generally centered on the application of the facts to the statutory definition of "gross negligence," the initial

inquiry shifted pursuant to the Michigan Supreme Court's opinion in *Robinson v City of Detroit*, 462 Mich 439 (2000). In *Robinson, supra*, the Court considered the phrase "gross negligence that is the proximate cause" and, concluding that there is a distinction between the phrases "the proximate cause" and "a proximate cause", held as follows:

> Further, recognizing that "the" is a definite article, and "cause" is a singular noun, it is clear that the phrase "the proximate cause" contemplates *one* cause. Yet, meaning must also be given to the adjective "proximate" when juxtaposed between "the" and "cause" as it is here. We are helped by the fact that this Court long ago defined "the proximate cause" as "the immediate, efficient, direct cause preceding the injury." *Stoll v Laubengayer*, 174 Mich 701, 706; 140 NW 532 (1913). The Legislature has nowhere abrogated this, and thus we conclude that in MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) the Legislature provided tort immunity for employees of governmental agencies unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause.

Applying this holding to the cases before it, where the plaintiffs were injured while passengers in a vehicle fleeing from the police, the *Robinson* Court held that "the proximate cause" in those cases was the reckless conduct of the drivers of the fleeing vehicles. Application of this holding to the case at bar similarly compelled a conclusion that "the proximate cause" of the deaths of plaintiff's decedents was not the conduct of the firefighter, since that conduct was clearly not "the one most immediate, efficient, and direct cause of the injury". Rather, that cause was the fire.

Indeed, a consideration of *Stoll v Laubengayer*, 174 Mich 701 (1913), on which *Robinson, supra*, relied for its definition of "the proximate cause," supports defendant's position that, even assuming that the officer's actions were a cause in fact of the injuries, that action could not be considered "the proximate cause" of the injuries. In *Stoll, supra*,

the Court found that the causal effect of the child's sledding action was sufficient to nullify any causal effect of the defendant's having left his horses standing over the path. In *Robinson, supra*, the reckless driving of the fleeing drivers had the same effect on any negligence of the pursuing officers. However, in the case at bar, if there is one cause which so predominated so as to nullify the legal effect of other causes, and break the chain of causation, it was necessarily the fire. In other words, the only cause which could conceivably constitute "the proximate cause" was the fire. In no event was it the action taken by the firefighter while fighting that fire.

However, both the circuit court and the majority opinion of the Court of Appeals rejected this contention on the basis that reasonable persons could disagree as to whether the firefighter's decision to spray water on the burning building was the one most immediate, efficient, and direct cause of the injury, rather than the fire itself. This conclusion is inconsistent with the analysis of the Michigan Supreme Court in *Robinson, supra*, and also inconsistent with the analysis of the unpublished Michigan Court of Appeals opinion in *Ortiz v Porter*, CA #226466 (11/30/01), attached hereto as Exhibit J In *Ortiz, supra*, as in the case at bar, plaintiffs' decedents died in a house fire. The *Ortiz* plaintiffs sought to impose liability on the defendant fire inspector for his alleged gross negligence in failing to ensure that a smoke detector was placed in the home, as he had allegedly promised to do. The lead opinion, signed by Judge Gage, held that the summary disposition granted the fire inspector by the circuit court could be sustained on the basis that his conduct did not constitute "the proximate cause" of the deaths:

> The evidence suggests that a candle the rental home residents left burning while they slept started the fire. Whatever the cause of the fire, the fire itself plainly constituted the one most immediate and direct cause of plaintiffs' injuries, and defendant indisputably had no involvement with the fire's commencement.

[While not disagreeing with Judge Gage, Judge Griffin would have left the issue of proximate cause to be resolved by the circuit court in the first instance, as would Judge Meter, who would have affirmed summary disposition because of the absence of any duty of protection owed by the defendant fire inspector, citing *Murdock v Higgins*, 454 Mich 46 (1997).]

Although Judge Gage's opinion in *Ortiz, supra*, was not precedentially binding, her analysis was correct and should have guided resolution of this issue. Just as the building inspector's alleged gross negligence in *Ortiz* was not the proximate cause of the residents' deaths in the fire, neither would the alleged gross negligence of the firefighters who were called to respond to that home fire constitute the proximate cause of their deaths. "Whatever the cause of the fire, the fire itself plainly constituted the one most immediate and direct cause of plaintiffs' injuries, and defendant indisputably had no involvement with the fire's commencement." (*Ortiz, supra*, Gage, J.)

The contrary holding in the majority opinion is premised on what the majority perceives as a possibility that plaintiff's allegations, "if proven, would show that the children would have survived the fire if Childs had not acted in a grossly negligent manner." (Slip Opinion, p 6) This is, however, nothing more than a "but for" analysis, which may be consistent with an analysis of "cause in fact", and consistent with the

question of "a proximate cause", but does not suffice to establish "the proximate cause."

In *Sims v Fitzgerald*, CA #232056 (7/23/02), attached hereto as Exhibit V, the Court rejected the plaintiff's contention that action taken by a police officer could constitute "the proximate cause" of the injuries sustained by an innocent bystander:

> The officers' pursuit of Driskell was not the proximate cause of plaintiff's injuries. Rather, plaintiff's injuries most immediately and directly resulted from Driskell's loss of control of his car after he ran the red light and crashed into another vehicle. While plaintiff argues that but for the officers' pursuit of Driskell, she would not have been injured, but-for causation is not sufficient. The concept of proximate cause comprises both causation in fact or but-for causation, and legal or proximate cause. The two types of causation are not identical and causation in fact must be established "in order for legal cause or 'proximate cause' to become a relevant issue." *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Thus, while the officers' conduct may have been a cause in fact of plaintiff's injuries, it was not "the one most immediate, efficient, and direct cause of" those injuries. *Robinson, supra* at 462. Therefore, the trial court did not err in ruling that the officers were also immune from liability.
>
> (Slip Opinion, p 2)

Likewise, in *Hutchinson v Township of Portage*, CA #240136 (8/14/03), the Court held that the alleged overdredging of the lake wherein plaintiff's decedents drowned could not constitute the proximate cause of their deaths:

> A "but for" causation is plainly not enough to meet "the proximate cause" test of *Robinson*. Further, while the direct role that the depth of the dredging played in the drownings might well suffice to make the "overdredging" or the lack of warning signs *a* proximate cause of the drownings, ordinary proximate causation is not sufficient under *Robinson*.

Furthermore, the majority concluded that the allegations of gross negligence in firefighting could constitute "the one most immediate, efficient, and direct cause of the

injury" without discussion of the meaning of the terms "immediate", "efficient" or "direct". Yet, resort to common dictionary definitions of these terms demonstrates that the firefighting could not legally constitute the one cause that was most immediate, efficient and direct. The American Heritage Dictionary of the English Language, 3rd ed., sets forth the following definitions of these adjectives:

> **direct** * * * *adj.* 1. Proceeding without interruption in a straight course or line; not deviating or swerving: *a direct route.* 2. Straightforward and candid; frank: *a direct response.* 3. Having no intervening persons, conditions, or agencies; immediate; *direct contact; direct sunlight.* * * *
>
> **efficient** * * * *adj.* 1. Acting directly to produce an effect: *an efficient cause.* * * *
>
> **immediate** * * **adj.* 1. Occurring at once; instant: *give me an immediate response.* 2.a. Of or near the present time: *in the immediate future.* * * * 6. Acting or occurring without the interposition of another agency or object: direct. * * *

Definitions set forth in the Merriam Webster Collegiate Dictionary – 10th ed., are similar:

> **direct** *adj* * * * 2 a: stemming immediately from a source * * *
>
> **efficient** * * * *adj* * * * 1: being or involving the immediate agent in producing an effect * * *
>
> **immediate** * * * *adj* * * * 1 a: acting or being without the intervention of another object, cause, or agency * * *

The firefighting could not constitute the one most immediate, efficient and direct cause of the injuries. As recently reiterated in the unpublished Court of Appeals opinion in *K S v Walled Lake School District*, CA #244605 (6/8/04), attached hereto as Exhibit O;

"Our Supreme Court concluded in *Robinson v Detroit* * * * that the amended statute, as applied to governmental employees, 'contemplates *one* cause', which it described as 'the immediate, direct cause preceding the injury.'" As discussed in *Mack v City of Detroit*, 467 Mich 186 (2002), it was the plaintiff's burden to plead facts in avoidance of immunity. Her allegations of negligent firefighting – even grossly negligent firefighting – do not suffice.

II. FIREFIGHTERS WHO ARE CALLED TO FIGHT FIRES DO NOT OWE ACTIONABLE DUTIES TO THOSE WHO MAY BE INJURED IN THE FIRE.

The lower courts also rejected defendant's argument that summary disposition should have been granted to defendant Childs because plaintiff's complaint failed to implicate a duty owed by him to plaintiff's decedents. As explained by the Michigan Supreme Court in *Buczkowski v McKay*, 441 Mich 96, 100-101 (1992), the question of duty is the threshold issue in every tort suit, and raises the "'question of whether the defendant is under any obligation for the benefit of the particular plaintiff' and concerns 'the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other.'" Or, as stated in *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96 (1992): "A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *See also*, *Johnson v City of Detroit*, 457 Mich 695, 710 (1998), where the Court held that the conclusion that the public building exception applied to avoid the City's governmental immunity did not

answer the question of whether any duties had been owed to plaintiff. In other words, the liability and immunity determinations are distinct, and a determination that no immunity applies does not even begin to resolve the question of duty.

Moreover, and as argued in defendants' original motion for summary disposition, when the defendant is a governmental employee, the question of duty also requires the additional consideration of the "public duty doctrine," recognized by the Michigan Supreme Court in *White v Beasley*, 453 Mich 308 (1996). However, premised on the intervening Michigan Supreme Court opinion in *Beaudrie v Henderson*, 465 Mich 124 (2001), the circuit court rejected defendants' argument that the state claims against the individual firefighter, defendant Childs, should be dismissed because no duties were owed which could give rise to a cause of action for their alleged breach.

(A) The Public Duty Doctrine Should Apply to Firefighters Engaged in Fighting Fires.

As noted above, the threshold inquiry in every tort action is the question of "duty." In *White v Beasley*, 453 Mich 308 (1996), the Michigan Supreme Court recognized the viability of a "public duty doctrine" which limited the circumstances in which governmental employees might otherwise have been found to owe duties to a particular plaintiff based on traditional tort considerations. The lead opinion of Justice Brickley in *White, supra*, explained the public duty doctrine:

> We hold that the public-duty doctrine applies in Michigan. As defined by Justice Cooley, the public-duty doctrine provides
>
> > [t]hat if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or

> erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages. [2 Cooley, Tort (4th ed), §300, pp 385-386.]

(453 Mich, 316)

The exception to the public duty doctrine is the so-called "special relationship" exception. As set forth by the Supreme Court in *White, supra*, at 320, such a special relationship may be found only where there is:

> "(1) an assumption by the municipality, through promises or action, of an affirmative duty to act on behalf of the party who was injured;
>
> (2) knowledge on the part of the municipality's agent that inaction could lead to harm;
>
> (3 some form of direct contact between the municipality's agents and the injured party; and
>
> (4) that party's justifiable reliance on the municipality's affirmative undertaking. . . . [*Cuffy [v City of New York]*, 69 NY2d [255] at 260; 513 NYS2d 372; 505 NE2d 937 (1987).]"

Plaintiff's factual allegations in ¶¶ 6-9 of her 3rd Amended Complaint were apparently intended to satisfy this special relationship exception. These paragraphs allege that the defendants assumed the duty to act by agreeing to extinguish the fire and by taking affirmative steps to do so; that plaintiff and plaintiff's decedents had contact with the firefighters who advised them that the fire would be extinguished and the children rescued; that defendants knew that inaction would lead to death or injury; and that plaintiff and plaintiff's decedents justifiably relied on the firefighters to extinguish the

fire and save the children. However, while these allegations track the requirements of the special relationship exception, in the circumstances of this case they were necessarily legally insufficient. Even if there had been direct contact with the firefighters, there could have been no justifiable reliance on the firefighters conduct. Just as in *White, supra*, there could be no justifiable reliance on the police officer who allegedly failed to provide police protection:

> Further, any argument that she relied on the police officer because she knew that it was the officer's "duty" to aid victims of crime runs contrary to our rationale for adopting the public-duty doctrine itself. Such an argument is tantamount to arguing that a tort duty can be established solely on the basis of defendant's job title. Because we adopted the public-duty doctrine in part to protect government employees from liability based solely on their job title, we refuse to allow the exception to contradict the rule.
>
> (453 Mich, 325)

Similarly, in *Jones v Wilcox*, 190 Mich App 564, 569 (1991), the Michigan Court of Appeals rejected plaintiff's claims that firefighters who had failed to extinguish a building fire had owed a duty to those who died in the fire. "[I]n this action the fire fighters owed a duty to the general public to extinguish the building fire, not a specific duty to individuals injured as a result of the fire." See also, *Gazette v City of Pontiac*, 221 Mich App 579 (1997).

Thus, based on the precedent established prior to the Supreme Court's opinion in *Beaudrie v Henderson, supra*, firefighter Childs was entitled to summary disposition premised on the public duty doctrine. This was the law when the defendant's motion for summary disposition was filed. However, in *Beaudrie, supra*, the Supreme Court

thereafter limited application of the public duty doctrine in the context of its consideration of the duties owed by a police dispatcher to members of the public injured by the criminal conduct of third persons. After examining the split opinions in *White, supra*, this Court considered the purpose and rationale of the doctrine and declined to expand it.[21] The Court stated:

> Consistent with our opinion in *White*, we will, however, continue to apply the public duty doctrine, and its concomitant "special relationship" exception, [footnote omitted] in cases involving an alleged failure to provide police protection. [Footnote omitted] We agree with Chief Justice Brickley's statement in *White* that "[p]olice officers must work in unusual circumstances. They deserve unusual protection." *Id.* at 321. Moreover, the public duty doctrine as applied in *White* is consistent with the general common-law rule that no individual has a duty to protect another who is endangered by a third person's conduct absent "a special relationship" either between the defendant and the victim, or the defendant and the third party who caused the injury. *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997).
>
> However, for purposes of determining the liability of public employees other than police officers, we will determine a government employee's duty using the same traditional common-law duty analysis applicable to private individuals.
>
> * * *
>
> Distinguishing between a government employee's "public" and "private" duties has proven to be an unwieldy exercise. Moreover, the need for

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[21] In so doing, the *Beaudrie* court recognized that there was no indication in Justice Brickley's lead opinion [joined by Justices Riley and Weaver] which would have restricted application of the doctrine to a particular class of governmental employee, and that Justice Cavanagh's concurring opinion [joined by Justice Mallett] suggested that the doctrine was applicable to "'firefighters, life guards, and similar governmental safety professionals.'" [*Beaudrie, supra,* 465 Mich, 133]

> expanding the public duty doctrine outside the police protection context is undermined by the comprehensive protections from liability provided to government employees by the governmental immunity statute. Therefore, we decline to do so. * * *
>
> (465 Mich, 140-141, 142)

Premised on this opinion, and since defendant Childs was a firefighter, not a police officer, the circuit court denied summary disposition to Childs on plaintiff's claim that his decisions regarding the best method for fighting the fire constituted gross negligence. Having also found that he was not entitled to the "comprehensive protections from liability provided to government employees by the governmental immunity statute" [*Beaudrie, supra*, 465 Mich, 142], suit against Childs was allowed to proceed. The Court of Appeals affirmed this ruling.

It is respectfully suggested that the word "police" and/or the phrase "police protection" in the *Beaudrie* opinion's statement that the public duty doctrine would continue to be applied "in cases involving an alleged failure to provide police protection" [465 Mich, 141], should be broadly read as including the protection provided by officers (be they police officers, fire fighters, or "public safety" officers) when called to fight a fire. Doing so would compel dismissal of the state claim against defendant Childs premised on an application of the public duty doctrine. However, if the *Beaudrie* opinion intended to distinguish police officers from firefighters and "public safety"officials, and deprive firefighters (and public safety officials) engaged in firefighting from the additional protections of the public duty doctrine, this Court should reconsider its conclusion that firefighters engaged in providing protection to the public should have less

protection from liability than police officers engaged in providing protection to the public. Just as the *Beaudrie* Court stated concerning the responsibilities of police officers, firefighters must work in unusual circumstances and they deserve unusual protection.

(B) Under Common Law Tort Analysis, Firefighters Engaged in Fire Fighting Owe No Actionable Duty to Those Injured by the Fire.

As discussed above, it is defendants' position that no duty was owed by defendant Childs under the public duty doctrine. However, even if *Beaudrie* is read to preclude application of the public duty doctrine to firefighters, that opinion supports defendants' contention that, under traditional tort analysis, defendant Childs owed no actionable duty to plaintiff's decedents in the circumstances of this case and summary disposition should have been granted on that basis. Throughout its opinion, the *Beaudrie* Court noted the distinction between the public duty doctrine and the traditional common-law duty analysis, and reconfirmed that governmental employees are still entitled to that traditional common law duty analysis.

> Thus, we reject further expansion of the public duty doctrine. The liability of government employees, other than those who have allegedly failed to provide police protection, should be determined using traditional tort principles without regard to the defendant's status as a government employee. [*Beaudrie, supra,* 465 Mich, 134]
>
> * * *
>
> Such an analysis merely states the obvious: a plaintiff must show some common-law duty owed to him by the public employee. [*Beaudrie, supra,* 465 Mich, 135]

* * *

> However, we reject Justice Levin's suggestion in *White, supra* at 355, that MCL 691.1407 "defines the duty pursuant to which a governmental employee is subject to liability". The statute does not *create* a cause of action. Plaintiffs are still required to establish a common-law duty. [*Beaudrie, supra*, 465 Mich, 139, n12]
>
> * * *
>
> * * * Moreover, the public duty doctrine as applied in *White* is consistent with the general common-law rule that no individual has a duty to protect another who is endangered by a third person's conduct absent "a special relationship" either between the defendant and the victim, or the defendant and the third party who caused the injury. *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997).
>
> However, for purposes of determining the liability of public employees other than police officers, we will determine a government employee's duty using the same traditional common-law duty analysis applicable to private individuals. [*Beaudrie, supra*, 465 Mich, 141]

Thus, absent the special relationship discussed in *Murdock v Higgins*, 454 Mich 46 (1997), and reconfirmed by the Michigan Supreme Court in *Beaudrie*, defendant Childs owed no duty of protection to plaintiff's decedent which could give rise to liability. No such special relationship existed in the circumstances of this case. See, *e.g.,* Judge Meter's concurring opinion in *Ortiz v Porter*, CA #226466 (11/30/01), attached hereto as Exhibit J, when he considered the duty of a building inspector who had allegedly assured the plaintiff renters that he would ensure that a smoke detector was placed in their home. Although *Beaudrie* precluded application of the public duty doctrine to the building inspector, Judge Meter would have applied the principles of *Murdock v Higgins, supra*, to support dismissal premised on the absence of a duty.

RELIEF REQUESTED

Defendant-Appellant, Jeffrey Childs, respectfully requests that this Court grant his Application for Leave to Appeal and reverse the opinion of the Michigan Court of Appeals and the ruling of the Oakland County Circuit Court which denied him summary disposition.

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